APR 25 1927
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. [redacted] 229

LUCY B. BROOKE, Petitioner,

vs.

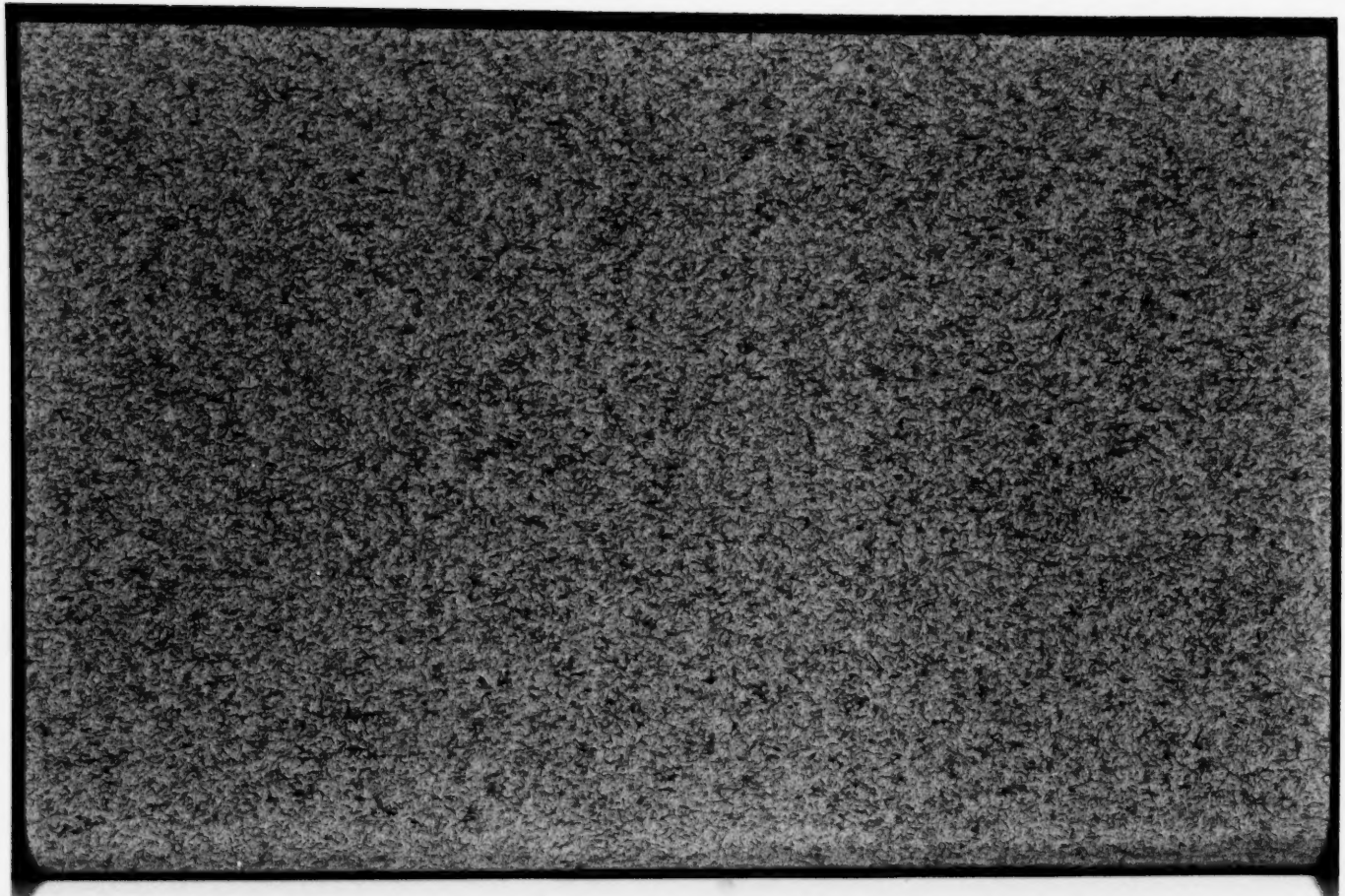
CITY OF NORFOLK, R. W. PEATROSS, A. PLUM-MER FARNELL, HARRY E. McCOY, and W. I. GILKESON.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

Filed April 25, 1927.

NATHANIEL T. GREEN,
ROBT. H. TUNSTALL,
Counsel for Petitioner.

(22,940)



INDEX TO PETITION.

	Page
Petition for a writ of certiorari	1
Statement of the case and question presented	1
Prayer for writ	6
Affidavit of Nathaniel T. Green and Robt. B. Tunstall	7
Certificate of counsel	8

STATUTE CITED.

Code of Virginia, Section 2307 (as amended: Acts of Assembly, 1920, p. 563; 1922, p. 906; 1923, p. 120)	3, 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 1079

LUCY B. BROOKE, PETITIONER,

vs.

CITY OF NORFOLK, R. W. PEATROSS, A. PLUMMER PANNILL, HARRY E. McCOY, AND W. I. GILKESON, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Lucy B. Brooke, respectfully shows to this Honorable Court as follows:

(1) That this is a proceeding for the correction of erroneous assessments of taxes in which the jurisdiction of this Court is invoked upon the ground that the

law of Virginia under which the said assessments were made, as interpreted by the courts of that State, takes the property of your petitioner without due process of law, and denies her the equal protection of the law, in contravention of the Fourteenth Amendment of the Constitution of the United States; the facts out of which this contention arises being as hereafter set forth.

(2) That prior to January 28, 1914, Eliza Andrews, who for many years prior to her death was a citizen and resident of the city of Baltimore, made a will, which was duly probated in the proper court of Maryland, and was, on the 28th day of January, 1914, admitted to probate in the Corporation Court of the city of Norfolk, Va., as a foreign will. By the terms of this will Miss Andrews gave and bequeathed to the Safe Deposit and Trust Company of Baltimore the sum of eighty thousand dollars ($80,000) in trust to pay the net income to your petitioner for her life, and after her death to pay one-fifth of the income to each of your petitioner's five daughters, and, after certain trusts not necessary to be here set forth, upon the death of the last survivor of the daughters, to divide the principal between the descendants of the daughters *per stirpes*.

(3) That this bequest was complied with by the delivery to the Safe Deposit and Trust Company of Baltimore as trustee of the property mentioned in the will; that the said company as trustee has ever since held the property so delivered to it in the State

of Maryland and city of Baltimore; that the property has never been in the city of Norfolk or State of Virginia or anywhere else than in Baltimore; that the property has been continuously taxed in the State of Maryland and city of Baltimore and the tax paid by the trustee; that your petitioner is ignorant as to the nature of the property in which the fund is invested, and neither has exercised any control over the property, nor has any authority to direct the investment thereof, nor to dispose of it; that your petitioner cannot call the trustee to account for any of its acts as trustee in any court in the State of Virginia, and that no process of any court in the State of Virginia can reach or touch the property of the trustee; that the trustee refuses to recognize as valid any tax levied on the property by the State of Virginia or any municipality thereof; and that though requested by your petitioner to join in these proceedings, the trustee has refused to do anything whatever in the matter.

(4) That the State of Virginia and the city of Norfolk, claiming that under and by virtue of the provisions of Section 2307 of the Code of Virginia, 1919, as variously amended (Acts of Assembly 1920, p. 563; 1922, p. 906; 1923, p. 120), the situs of the fund held by the Safe Deposit and Trust Company of Baltimore, as aforesaid, is in the city of Norfolk and State of Virginia, have assessed against your petitioner taxes against the corpus of the said fund amounting for the year 1924 to three hundred and sixty-two dollars and fifty-four cents ($362.54), and for the year 1925 to three

hundred and sixty-two dollars and fifty-six cents ($362.56).

(5) That on the 7th day of August, 1925, and on the 2d day of August, 1926, your petitioner filed in the Corporation Court of the City of Norfolk in pursuance of the statutes of Virginia in such cases made and provided, applications substantially identical except as to the year in respect to which the said taxes were assessed, alleging the facts set forth above, and further that the situs of the funds so sought to be assessed was in the State of Maryland and not in the State of Virginia, or in the City of Norfolk; and your petitioner further alleged that the attempted imposition by the State of Virginia and the City of Norfolk of taxes upon the corpus of the said fund constituted a taking of your petitioner's property without due process of law and deprives her of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States, the benefit and protection of which your petitioner then and there specially set up and claimed.

(6) That by order of the said Corporation Court of the City of Norfolk entered on the 20th day of November, 1926, the said proceedings were consolidated and heard together; that it was testified therein by the officers making the assessments complained of, that the matters and things set up in each of the applications above mentioned were true; and that the case was submitted to the court solely on the constitutional question hereinabove set forth.

(7) That it was stipulated by and between the parties and so appears in the order aforesaid (R. 21), that if the assessments complained of were in contravention of the Fourteenth Amendment of the Constitution of the United States, the relief prayed for should be granted; but the said Corporation Court of the City of Norfolk, on the said 20th day of November, 1926, overruled the contention of your petitioner that the said assessments were illegal, null and void, and overruled particularly and expressly the contention of your petitioner that the said assessments and the tax charged in pursuance thereof, were made and charged contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, and entered an order sustaining the said assessments.

(8) That thereafter your petitioner on, to-wit: the 27th day of January, 1927, filed her petition in the Supreme Court of Appeals of Virginia praying that that court allow a writ of error to the judgment of the Corporation Court of the City of Norfolk, entered as aforesaid, but on the 2d day of February, 1927, the said Supreme Court of Appeals of Virginia entered its order reciting that in its opinion that the said judgment of the Corporation Court of the City of Norfolk was plainly right, and rejecting the petition for a writ of error, and the said court expressly affirmed the judgment of the Corporation Court of the City of Norfolk (R. 22).

(9) That the said judgment of the Supreme Court of Appeals of Virginia is a judgment of the highest court

of the State of Virginia in which a decision in the suit could be had, and that there was drawn in question, as above set forth in said suit, the validity of the aforesaid Section 2307 of the Code of Virginia of 1919 (as amended) upon the ground that the said statute as interpreted by the courts of Virginia is repugnant to the Fourteenth Amendment of the Constitution of the United States, and that there was specially set up and claimed in the said suit a title, right, privilege and immunity on behalf of your petitioner, under the said Fourteenth Amendment of the Constitution of the United States, to the benefit and protection of the said Fourteenth Amendment against the imposition of the assessments herein complained of, as aforesaid.

(10) That the said Supreme Court of Appeals of Virginia erred in rejecting your petitioner's petition for a writ of error and in affirming the judgment of the Corporation Court of the City of Norfolk as aforesaid, for the reason that the claim of your petitioner that the taxes and assessments complained of were, for the reasons above set forth, invalid and void under the Fourteenth Amendment of the Constitution of the United States, and the title, right, privilege, and immunity under the said amendment specially set up and claimed by your petitioner, as aforesaid, should have been sustained.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court direct to the Supreme Court of Ap-

peals of Virginia, commanding the said court to certify and send to this Court, on a day certain to be therein designated, a full, true and complete transcript of the record and of all proceedings of the said Supreme Court of Appeals of Virginia in the said case therein entitled Lucy B. Brooke, petitioner, *against* The City of Norfolk, R. W. Peatross, A. Plummer Pannill, Harry E. McCoy, and W. I. Gilkeson, to the end that the said cause may be reviewed and determined by this Court as provided by Section 237 of the Judicial Code of the United States as amended, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the provisions of law, and that the said judgment of the said Supreme Court of Appeals of Virginia in the said cause, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

NATH'L T. GREEN,
ROBT. B. TUNSTALL,
Attorneys for Petitioner.

STATE OF VIRGINIA,
City of Norfolk, To wit:

This day personally appeared before me, Rosa T. Bilisoly, a notary public in and for the State and city aforesaid, Nathaniel T. Green and Robt. B. Tunstall, who, being duly sworn, deposed and said that they are counsel for the above-named petitioner and that the matters and things in the foregoing petition are true,

to the best of their knowledge, information and belief.

Given under my hand and seal this 7th day of April, 1927.

[SEAL.] ROSA T. BILISOLY,
Notary Public.

We hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay, and that in our opinion the case is a proper one for the issuance of the writ of certiorari prayed for.

NATH'L T. GREEN.
ROBT. B. TUNSTALL.

INDEX TO BRIEF.

	Page
Brief in support of petition for writ of certiorari	1
Statement of the case	1
The questions involved	1
The facts	1
Argument	3
Summary of argument	3
(1) Cases involving the situs for taxation of intangible personal property	5
(2) Cases involving the situs for taxation of tangible personal property	20
Cases in other courts	31
Conclusion	34

TABLE OF CASES CITED.

Blackstone v. Miller, 188 U. S., 189; 47 L. Ed., 439 ..... 8, 10, 19
Bristol v. Washington County, 177 U. S., 133; 44 L. Ed., 701 ... 6, 19
Buck v. Beach, 206 U. S., 392; 51 L. Ed., 1106 ..... 10, 12, 13, 14
Bullen v. Wisconsin, 240 U. S., 625; 60 L. Ed., 831 14
Commonwealth v. West India Oil Refining Co., 138 Ky., 828; 129 S. W., 301; 36 L. R. A., N. S., 295 31
De Ganay v. Lederer, 250 U. S., 376; 63 L. Ed., 1042 ..... 16, 19
Delaware, etc., R. Co. v. Pennsylvania, 198 U. S., 341; 49 L. Ed., 1077 23
Ellett v. Commonwealth, 132 Va., 136 34
Fidelity, etc., Co. v. Louisville, 245 U. S., 54; 62 L. Ed., 154 .... 15, 17
Franklin Trust Co. v. Booker, 122 Va., 680 33
Frick v. Pennsylvania, 268 U. S., 473; 69 L. Ed., 1058 28
Kirtland v. Hotchkiss, 100 U. S., 491; 25 L. Ed., 558 ..... 5, 16, 17, 19
Louisville, etc., Ferry Co. v. Kentucky, 188 U. S., 385; 47 L. Ed., 513 22
Maguire v. Trefry, 253 U. S., 12; 64 L. Ed., 739 ..... 17, 19
Metropolitan, etc., Ins. Co. v. New Orleans, 205 U. S., 395; 51 L. Ed., 853 ..... 9, 12, 19
New Orleans v. Stempel, 125 U. S., 309; 44 L. Ed., 174 .. 5, 6, 7, 8, 12, 14, 19, 20
New York, &c., Ins. Co. v. Head, 234 U. S., 149, 162; 58 L. Ed., 1259, 1265 14

Page

Pullman Palace Car Co. v. Pennsylvania, 141 U. S., 18; 35 L. Ed., 613 ..... 21, 23, 29
Selden v. Brooke, 104 Va., 832 32
Sellinger v. Kentucky, 213 U. S., 200; 53 L. Ed., 761 14
State Board of Assessors v. Comptoir Nationale d'Escompte, 191 U. S., 388; 48 L. Ed., — 8, 12, 19
State Tax on Foreign Held Bonds, 15 Wall., 300; 21 L. Ed., 179 ..... 5, 6, 26
Union Refrigerator Transit Co. v. Kentucky, 199 U. S., 185; 50 L. Ed., 150 ..... 16, 24, 29
Wheeler v. Sohmer, 233 U. S., 434; 58 L. Ed., 1030 ..... 10, 12
Wise v. Commonwealth, 122 Va., 693 ..... 33, 34

STATUTE CITED.

Federal Revenue Act of 1913 16

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 1079.

LUCY B. BROOKE, PETITIONER,

vs.

CITY OF NORFOLK, R. W. PEATROSS, A. PLUMMER PANNILL, HARRY E. McCOY, AND W. I. GILKESON, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

THE QUESTION INVOLVED.

This case presents sharply for decision the question whether a State or any political subdivision thereof can, consistently with the provisions of the Fourteenth Amendment, tax to a resident beneficiary for life, the *corpus* of a trust estate created by a non-resi-

dent in favor of a non-resident trustee, the subject matter of the trust being held by the non-resident trustee outside of the State free from control of the resident beneficiary, and without accountability to the resident beneficiary in any of the courts of the State, the subject matter of the trust thus receiving no protection from the State, or any political subdivision thereof, or by reason of its laws.

The Facts.

The facts are set forth in the petition for certiorari and may be briefly summarized as follows:

The testator of the petitioner, a citizen and resident of Baltimore, created by will a trust fund with a Baltimore trust company as trustee, the income of which fund was to be paid to the petitioner for life and after her death to her daughters for their life, and upon the death of the last survivor of the daughters, the principal of the fund was to be divided between their descendants. The petitioner was at the time the trust was created, and has been ever since, a resident of Norfolk, Virginia. The terms of the will were complied with by the delivery of the trust fund to the trust company, and the fund has ever since remained in the custody of that company in Baltimore, where it is taxed by both the city of Baltimore and the State of Maryland. The petitioner is not advised as to the nature of the trust investment, and neither can exercise nor has exercised any control over it. The State of Virginia and the city of Norfolk have undertaken

to tax the corpus of the estate against the petitioner as life tenant. The petitioner has regularly returned the income in Virginia for taxation, but is in these proceedings resisting the tax upon the corpus upon the ground that its imposition constitutes a taking of property without due process of law and a denial of the equal protection of the laws in contravention of the Fourteenth Amendment. The trustee refuses to recognize any tax levied on the property by the State of Virginia or the city of Norfolk, and has refused to join in these proceedings. The facts are undisputed, the tax authorities who made the assessments having expressly testified that the facts stated in petitioner's applications for relief are true. It is stipulated in the record that if the tax is invalid under the Fourteenth Amendment, the relief prayed by petitioner should be granted. The decision of the Corporation Court of Norfolk expressly overruled petitioner's contention under the Constitution, and its decision was affirmed by the Supreme Court of Appeals of Virginia, to which court this writ of certiorari is sought.

ARGUMENT.

Your petitioner's argument may be outlined as follows:

That a State can tax only that property of which it has jurisdiction; that it has jurisdiction only of such property as is within the State; that the only theory upon which intangible personal property physically located outside of the State can be held to be within

its jurisdiction is that the situs of that property is the domicile of the owner, in accordance with the rule *mobilia sequuntur personam;* that this rule is but a rule of convenience, based upon the owner's presumed dominion over the property, and embodies a legal fiction which yields to the fact in any case where the fact can be made indubitably to appear; that the fiction has so yielded to fact in the matter of tangible personal property; and that it must likewise yield to fact in the case of intangible personal property where the manner in which that property is held is such as to exclude the possibility of the dominion over it of the person beneficially interested, and consequently to exclude the hypothesis that its situs is or can be at that person's domicile; and that if, as this Court has held, tangible personal property habitually kept by the owner outside of the State of his domicile is not subject to taxation in that State, although it would be at any time within the power of the owner to bring that property into the jurisdiction of the State, there is far more reason for holding that intangible personal property which is located without the State and *which the person beneficially interested could not, even if he wanted to, possibly bring within the State,* is not subject to taxation by the State of that person's domicile.

It is a rather singular fact that the precise situation here presented has never come before this Court, the more so as it is one of frequent occurrence. Many similar, though not identical, questions have, however, been dealt with, and it is believed that both the principles decided and the language employed in deciding

them point to a solution of the problem before the court. We shall, therefore, in as brief compass as possible review some of the principal cases; and for the sake of orderly arrangement will deal first with cases involving intangible personal property, and subsequently with cases involving tangible personalty.

(1) Cases Involving the Situs for Taxation of Intangible Personal Property.

In *State Tax on Foreign Held Bonds*, 15 Wall., 300; 21 L. Ed., 179, it was held that a State could not tax bonds of a resident corporation held by non-residents, the court saying:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State."

In *Kirtland v. Hotchkiss*, 100 U. S., 491; 25 L. Ed., 558, it was held that the State of the owner's residence could tax bonds held by him in a foreign State in which the owner voluntarily kept the bonds.

This rule, however, does not militate against the taxability of such securities in the State in which they physically abide; for in *New Orleans v. Stempel*, 125 U. S., 309; 44 L. Ed., 174, it was held that loans and credits in Louisiana might be taxed in that State, although the owner was domiciled in New York. The maxim *mobilia sequuntur personam* was invoked to show that the situs of the property in question was at the domicil of the owner, and it was contended that

State Tax on Foreign Held Bonds, supra, had treated this rule as an unvarying one. But the court cited many cases to sustain the point that the rule was but a fiction of convenience; and speaking of *State Tax on Foreign Held Bonds,* said that the language of that decision which was relied upon

> "* * * properly construed, is not to be taken as a denial of the power of the legislature to establish an independent situs for bonds and mortgages when those properties are not in possession of the owner, but simply that the fiction of law, so often referred to, declares their situs to be that of the domicile of the owner, a declaration which the legislature has no power to disturb when in fact they are in his possession."

And the court concluded its opinion with the following observation:

> "It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicil of the owner; are subject to levy and sale on execution, and to seizure and delivery under replevin; and yet they are but promises to pay—evidences of existing indebtedness. Notes and mortgages are of the same nature; and while they may not have become so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a State may not declare that if found within its limits they shall be subject to taxation."

The doctrine of *New Orleans v. Stempel, supra,* was advanced a step further in *Bristol v. Washington*

County, 177 U. S., 133; 44 L. Ed., 701, where investments, in the form of notes for moneys lent, of a non-resident were held taxable by the State in which the investments were made by a resident agent who had the power to invest and reinvest moneys, at whose office the loans were made payable, who retained the mortgages securing them, and to whom the notes taken for the loans were returned from time to time for purposes of renewal, collection, or foreclosure, notwithstanding the fact (not existing in the *Stempel* case) that the notes were sent out of the State to the owner and retained by her except when necessarily forwarded to the agent. That this latter circumstance was immaterial was laid down by this Court in the following language:

> "In *New Orleans v. Stempel*, 175 U. S. 309, *ante*, 174, 20 Sup. Ct. Rep. 110, certain taxes were levied on money on deposit, and also on money loaned on interest, credits, and bills receivable, and it was held by this court that the statutes of Louisiana, as interpreted by the Courts of that State, in authorizing such assessment, did not violate the Constitution of the United States. There the money, notes, and evidences of credit were in fact in Louisiana, though their owners resided elsewhere. Still, under the circumstances of the case before us, we think, as we have said, that the mere sending of the notes to New York and the revocation of the power of attorney did not take these investments out of the rule."

There was no showing in this case that the State of the taxpayer's domicil had attempted to tax the prop-

erty; but such a situation was presented in *Blackstone v. Miller,* 188 U. S., 189; 47 L. Ed., 439. There the question was as to the power of the State of New York to impose a tax upon the transfer after death of a deposit in a New York Trust Company of funds belonging to a resident of Illinois, by which State the funds had previously been taxed. The court sustained the power of New York to tax the property, basing the decision on the broad ground stated in the following expression:

> "If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the State of New York, then New York may subject the transfer to a tax."

In *State Board of Assessors v. Comptoir Nationale d'Escompte,* 191 U. S., 388; 48 L. Ed., the question was as to the taxability in Louisiana of certain credits represented by checks drawn by the borrower, secured by collateral deposited in Louisiana, the checks being ultimately sent to the home office of the lender (the Comptoir) in Paris, to which the money lent, when repaid, was remitted unless again lent by the local agent of the lender. It was held, following *New Orleans v. Stempel, supra,* that the taxation of its credits in Louisiana did not violate the Fourteenth Amendment, the credits having a local situs in Louisiana. As to the maxim *mobilia sequunter personam* the court said:

> "The maxim, *Mobilia sequuntur personam*, which was applied in the court below as forbidding taxation of the checks in the hands of the agent in New Orleans, has been frequently held to be but a fiction of law, having its origin in considerations of general convenience and public policy, and not to be applied to limit and control the right of the state to tax property within the jurisdiction, it being intended to permit the owner to deal with his personalty according to the law of his domicil, and to make testamentary disposition of it according to the law where he is rather than that of the situs of the property. It was intended for convenience, and not to be controlling where justice does not demand it."

Metropolitan, etc., Ins. Co. v. New Orleans, 205 U. S., 395; 51 L. Ed., 853, involved the same Louisiana statute as that dealt with in the *Comptoir National* case, *supra*. The subject of taxation to which the case related was credits arising out of loans made by an insurance company in Louisiana, it appearing that the notes evidencing the loans were habitually kept at the company's home office in New York. Following the case of *Bristol v. Washington County, supra*, this Court held immaterial the fact of the usual actual location of the evidences of debt, treating as the "controlling consideration" the "presence in the State of the capital employed in the business of lending money." The court said:

> "Moreover, neither the fiction that personal property follows the domicil of its owner, nor

the doctrine that credits evidenced by bonds and notes may have the situs of the latter, can be allowed to obscure the truth."

Citing *Blackstone v. Miller, supra.*

Buck v. Beach, 206 U. S., 392; 51 L. Ed., 1106, particularly in the light of its consideration in *Wheeler v. Sohmer,* 233 U. S., 434; 58 L. Ed., 1030, is not altogether easy of analysis. There it appears that one Nash, a resident of New York, invested largely in notes and mortgages in the States of Ohio and Indiana, in each of which States he had an agent. Notes made in Ohio, together with the mortgages on Ohio property securing them, were sent from Ohio to the Indiana agent, who kept them in a safe, sending them back to Ohio, however, in order to have interest payments credited on them, or to be surrendered when paid, and also sending them to Ohio a few days prior to the day fixed by Indiana for assessing such property, a few days subsequent to which time they were returned to Indiana. The question involved in the case was the taxability in Indiana of these Ohio notes.

A majority of the court, speaking through Mr. Justice Peckham, after observing that the notes were sent to Indiana for the purpose of evading taxation in Ohio, held that they were not taxable in Indiana. It was pointed out that the sole ground upon which the tax could be sustained was the presence of the notes in Indiana, and that no case had been before the court in which neither the person assessed nor the debtor was a resident of or present in the State where the tax was

imposed, and where no business was done therein by the owner of the notes or his agent relating in any way to the capital evidenced by the notes assessed for taxation. The prior cases were reviewed, and the court's conclusion stated as follows:

> "Our decision in this case has no tendency to aid the owner of taxable property in any effort to avoid or evade proper and legitimate taxation. The presence of the notes in Indiana formed no bar to the right, if it otherwise existed, of taxing the debts evidenced by the notes in Ohio. It does, however, tend to prevent the taxation in one State of property in the shape of debts not existing there, and which, if so taxed, would make double taxation almost sure, which is certainly not to be desired, and ought, wherever possible, to be prevented.
>
> "For the reason that, as the assessment in this case was made upon property which was never within the jurisdiction of the State of Indiana, the State had no power to tax it, and the enforcement of such a tax would be the taking of property without due process of law."

A vigorous dissenting opinion was filed by Mr. Justice Day (Mr. Justice Brewer concurring therein), upon the ground that while the precise question decided had not been before the court, its previous decisions clearly indicated that notes, bonds, and mortgages might acquire a situs, separate from the domicile of the owner, at the place where they were held. Practically all the cases hitherto reviewed in this brief were cited, special emphasis being laid upon

the following declaration in *New Orleans v. Stempel, supra,* which the dissenting opinion italicized:

> *"Notes and mortgages are of the same nature; and, while they may not have become so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a state may not declare that, if found within its limits, they shall be subject to taxation."*

Buck v. Beach was very fully reviewed in *Wheeler v. Sohmer,* 233 U. S., 434; 58 L. Ed. 1030, where the question was as to the validity of a tax upon transfer after death imposed by the State of New York upon notes belonging to a non-resident and kept by him in a safe-deposit box in New York City. It was contended that *Buck v. Beach* decided the question adversely to the tax.

Four justices (Holmes, Day, Lurton, and Hughes, JJ.), held that the tax was valid—in support of which conclusion the *Stempel, Bristol, Comptoir National,* and *Metropolitan* cases, all *supra,* were cited—and that *Buck v. Beach* was probably distinguishable upon the grounds (*a*) that the Ohio notes there involved were moved back and forth between Ohio and Indiana with intent to avoid taxation in either State, and that their absence from Ohio was unjustified, and was thus "regarded as a temporary absence from home," (*b*) that the decision was carefully limited to the circumstances of the particular case, and (*c*) that a distinction had been taken between the "presence of the property" required for the property tax there in-

volved, and that sufficient to sustain a succession tax. But these judges, speaking through Mr. Justice Holmes, added:

> "If Buck *v.* Beach is not to be distinguished on one of the foregoing grounds, as some of us think that it can be, we are of opinion that it must yield to the current of authorities to which we have referred."

Two judges (McKenna and Pitney, JJ., speaking through the former), concurring in the result, held, reviewing the cases leading up to *Buck v. Beach*, that in all of them, whatever the expressions used in the opinions, the real basis of the decision was the *situs of the debt*, and not the physical presence of the notes; that it was not necessary "to overrule *Buck v. Beach*, nor make it yield in any particular to sustain the tax in the case at bar" because the *Buck* case had "in effect, reserved from its principal inheritance or succession taxing acts by rejecting as not in point cases which involved them"; and that the case at bar came within the reservation so made.

Three judges (White, C. J., and Van Devanter and Lamar, JJ., speaking through the latter) concurred in Mr. Justice McKenna's analysis of the *ratio decidendi* of *Buck v. Beach*, but held that the principle there decided—that it was the situs of the debt rather than the physical presence of its evidences—applied to inheritance and transfer taxes as well as to direct taxes, and that the tax in the case at bar should therefore be held invalid.

It may be noted in this connection that the property, in respect of which the tax was sustained by six of the nine judges, consisted of notes made by a citizen of Illinois, secured by a mortgage on land in that State, and notes made by a Virginia corporation; so that in no sense could the situs of the debt be said to be in New York. And the plurality opinion quoted with approval the following language from the *Stempel* case:

> "It is well settled that bank bills and municipal bonds are in such a concrete, tangible form that they are subject to taxation where found, irrespective of the domicil of the owner; * * * Notes and mortgages are of the same nature * * * we see no reason why a state may not delare that, if found within its limits, they shall be subject to taxation."

It may be added that except for a marginal citation (on the general principle that a State cannot extend its authority beyond its legitimate jurisdiction) in *New York, &c., Ins. Co. v. Head*, 234 U. S., 149, 162; 58 L. Ed. 1259, 1265, and a citation on another point in *Selliger v. Kentucky*, 213 U. S., 200; 53 L. Ed., 761, *Buck v. Beach*, does not appear, upon an examination extending through 271 U. S., ever to have been since cited by this Court.

White perhaps differing somewhat in principle from the current of cases being examined here, it may not be inappropriate to notice at this point, where chronologically it belongs, the case of *Bullen v. Wisconsin*, 240 U. S., 625; 60 L. Ed. 831, especially because it carries, in our judgment, an important suggestion as

to the case at bar. In that case it appeared that one Bullen, a resident of Wisconsin, had created a trust in favor of a Chicago trust company with directions after his death to pay over one-third of the income (subject to certain small gifts) to his widow for her life, and the rest of the income and ultimately the principal to his four sons. But he reserved the entire capital of the trust during his life, including the right to revoke it, and in fact he received the entire income during his life. The case involved not the taxability of the fund during Bullen's life, but the liability of the fund to inheritance taxation by Wisconsin. It was held that it was so liable. Apart from such differences of principle as might have been considered to exist between inheritance tax cases and direct tax cases, hereinbefore adverted to, the noteworthy circumstance is that the whole stress of the court's opinion was laid upon the revocable character of the trust, which resulted, as the court said, in the Wisconsin court's being "fully justified in treating Bullen's general power of disposition as equivalent to a fee for the purposes of the taxing statute." This emphasis, we suggest, points by contrast to the different rule to be applied in the case at bar.

Fidelity, etc., Co. v. Louisville, 245 U. S., 54; 62 L. Ed. 154, involved the validity of a tax by the City of Louisville upon a resident in respect of deposits in St. Louis of a business there carried on by the Kentucky resident. It was held that the tax might lawfully be imposed. For the sake of argument, it was conceded that the deposits might also have been taxed

in Missouri; but the court held it proper to presume that the Kentucky tax was imposed "for the general advantages of living within the jurisdiction," and that those advantages might "be measured more or less by reference to the riches of the person taxed." *Kirtland v. Hotchkiss, supra,* was relied upon; and of *Union Refrigerator Transit Co. v. Kentucky,* 199 U. S., 184; 50 L. Ed. 150 (to be noticed later), it was pointed out that it related to chattel property; and the court said that it had not attempted to press so far as was contended for the principle that the power of taxation ought to be denied as to debts depending for their validity and enforcement upon a jurisdiction other than that levying the tax.

It is important to notice, though perhaps superfluous to point out, that in this case the keeping of the deposit in Missouri was a purely voluntary act on the part of the taxpayer.

In *De Ganay v. Lederer,* 250 U. S., 376; 63 L. Ed. 1042, the question was as to the taxability under the Federal Revenue Act of 1913 of the income from stock and bonds owned by a non-resident alien, but kept in Pennsylvania by an annuity and life insurance company acting as agent for the owners. This question was treated by the court as involving the simple inquiry: "Is the income from the stock, bonds, and mortgages, held by the Pennsylvania Company, derived from property owned in the United States?"

The court answered the question affirmatively, citing a number of the cases heretofore reviewed, and saying:

> "We have no doubt that the securities herein involved are property. Are they property within the United States? It is insisted that the maxim, '*Mobilia sequunter personam*,' applies in this instance, and that the *situs* of the property was at the domicil of the owner in France. But this Court has frequently declared that the maxim, a fiction at most, must yield to the facts and circumstances of cases which require it; and that notes, bonds, and mortgages may acquire a *situs* at a place other than the domicil of the owner, and be there reached by the taxing authority."

Finally, in *Maguire v. Trefry*, 253 U. S., 12; 64 L. Ed. 739, a case was presented of the taxation of the income of a fund held by a non-resident trustee for a resident beneficiary. Had the case involved taxation of the corpus it would have been substantially identical with that at bar. Citing *Fidelity, etc., Co. v. Louisville, supra,* and *Kirtland v. Hotchkiss, supra,* the court held the income to be taxable. It may not be inappropriate here to say that in the case at bar the record shows that the petitioner does not question and has paid the tax similarly imposed by the State of Virginia upon the income received by her.

But the important point to observe in connection with this decision is that the court stated that in considering the constitutional questions involved, it would accept the views taken by the Massachusetts Court of its statute, which is quoted from the decision below as follows:

> "The income tax is measured by reference to the riches of the person taxed actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. *It is founded upon the protection afforded to the recipient of the income by the Government of the commonwealth of his residence in his person, in his right to receive the income, and in his enjoyment of the income when in his possession.* That Government provides for him all the advantages of living in safety and in freedom, and of being protected by law. It gives security to life, liberty, and the other privileges of dwelling in a civilized community. *It exacts in return a contribution to the support of that government, measured by and based upon the income, in the fruition of which it defends him from unjust interference.* It is true of the present tax, as was said by Chief Justice Shaw in Bates *v.* Boston, 5 Cush. 93, at page 99: 'The assessment does not touch the fund, or control it, nor does it interfere with the trustee in the exercise of his proper duties; nor call him, nor hold him, to any accountability. It affects only the income, after it has been paid by the trustee' to the beneficiary." (Italics ours.)

We pause merely to point out that the italicized language, however undeniably accurate in connection with the case before the court—that of an income tax—in connection with which it was used, is wholly inappropriate so far as relates to the *corpus* of a fund in respect of which the taxing State grants and can grant neither enjoyment, security, nor protection.

With this we conclude our examination of cases involving the taxation of intangible property and income Briefly synthesizing the results, the following propositions appear to be established:

(1) A State may not tax property outside of its jurisdiction (*State Tax on Foreign Held Bonds* and authorities *passim*).

(2) A State may apply the rule *mobilia sequuntur personam*, and tax intangibles voluntarily kept or placed by one of its citizens without the State (*Kirtland v. Hotchkiss; Fidelity, etc., Co. v. Louisville*); and the foregoing rule holds good when he has established a trust revocable at his instance (*Bullen v. Wisconsin*).

(3) A State may tax the income of a citizen derived from property without the State, even though that property be held in trust (*Maguire v. Trefry*), and may tax the income of non-residents from property within the taxing jurisdiction (*De Ganay v. Lederer*).

(4) Intangible property consisting of notes, bonds, and stocks may acquire a situs for purposes of taxation separate and apart from the domicile of the owner (*New Orleans v. Stempel; Blackstone v. Miller; State Board of Assessors v. Comptoir National; Wheeler v. Sohmer*); and this is true even though such intangibles are frequently sent to the owner and remain in his possession (*Bristol v. Washington County; Metropolitan, etc., Ins. Co. v. New Orleans*).

(5) The rule *mobilia sequuntur personam* is a fiction of convenience, which always yields to the fact when required by positive law or considerations of justice (*New Orleans v. Stempel; State Board of Assessors v. Comptoir National; Metropolitan, etc., Insurance Co. v. New Orleans;* and many others).

(6) This Court has never dealt with the case of the *corpus* of a trust estate held outside the taxing State by virtue of the terms of the trust instrument, the trustor being a non-resident and the beneficiary being without control of or power over the trust subject. This is the case presented here.

(2) Cases Involving the Situs for Taxation of Tangible Personal Property.

In undertaking a separate examination of cases within this category we would not be understood as considering that the constitutional questions arising as to the situs of tangible and intangible property respectively call fundamentally for differing methods of approach. This is not our view. In every case the question presented is whether the subject of taxation is within the jurisdiction of the State. The distinction sometimes taken, and usually correctly taken, between the two classes of property in this connection may be regarded, speaking broadly, as a matter of evidence; not, indeed, evidence in its technical legal sense of the body of law relating to the production of testimony, but as evidence in a wide sense, growing out of the nature of the

property, on the question of situs. From this standpoint we have held it well to treat separately the two classes of property, the more so since in our opinion that method of treatment is peculiarly appropriate in the present case. We shall not attempt exhaustiveness, but shall present the cases in sufficient detail to note the trend of decision. Furthermore, since no question of interstate commerce is here involved, we shall lay on one side cases in which that matter was treated as a determinative element.

Pullman Palace Car Co. v. Pennsylvania, 141 U. S., 18; 35 L. Ed., 613, did not directly involve a tax upon the property of the company, but a tax upon its capital stock which the court treated as being "in substance and effect, a tax upon that property." The tax was levied by Pennsylvania upon such a proportion of the capital stock as the miles run by the company's cars in Pennsylvania bore to the total number of miles run. The company was a corporation of Illinois. The tax was sustained. In the course of Mr. Justice Gray's opinion he said:

> "No general principles of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State. The old rule, expressed in the maxim *mobilia sequuntur personam,* by which personal property was regarded as subject to the law of the owner's domicil, grew up in the Middle Ages, when movable property consisted chiefly of gold

> and jewels, which could be easily carried by the owner from place to place, or secreted in spots, known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used."

Giving effect to these principles, the learned justice held that the State had the right to "tax the specific cars which at a given moment were within its borders"; and having approved the method of assessment adopted, the sustaining of the tax ensued.

Louisville, &c., Ferry Co. v. Kentucky, 188 U. S., 385; 47 L. Ed., 513, is not a case of tangible personal property, but may conveniently be noticed under this head. It was there held that the inclusion, by Kentucky, in the valuation for tax purposes of the franchise by a Kentucky ferry corporation, of a franchise granted that corporation by Indiana for a ferry from the Indiana to the Kentucky shore, violated the Fourteenth Amendment. In reaching its conclusion the court said:

> "While the mode, form, and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government."

Delaware, etc., R. Co. v. Pennsylvania, 198 U. S., 341; 49 L. Ed. 1077, dealt with a tax imposed by Pennsylvania upon the capital stock of corporations. Among the company's assets was a considerable quantity of coal which had been mined by the company (a Pennsylvania corporation) but shipped by it to points without the State, and which remained permanently without the State awaiting sale or other disposition. The coal so on hand at the taxing date was approximately the same as that usually kept in stock at the points of storage; and it was the company's contention that its value should be deducted from the total value of the stock in order to determine the amount constitutionally taxable in Pennsylvania. The contention was sustained. The tax upon the value of the capital stock was treated as a tax upon the property in which that capital was invested (*Pullman, etc., Co. v. Pennsylvania, supra,* and other cases), and as it was outside the jurisdiction of Pennsylvania it was held not to be taxable there. A contention "that, by reason of the transitory character of the coal, it has never, in law, lost its original domicil * * * in Pennsylvania" was rejected. The protection of the 14th Amendment was thus asserted:

> "It is plain that in the case at bar the coal had lost its situs in Pennsylvania by being transported from that state to foreign states for the purposes of sale, with no intention that it should ever return to its state of origin. It was, therefore, as much outside the jurisdiction of the state of Pennsylvania to tax it as was the Indiana franchise in the case just cited, and it has

> been taxed just as directly and specifically under the facts stated in this case as was the Indiana franchise taxed in Kentucky by the valuation of the Kentucky franchise, which value was increased by the value of the franchise created by Indiana. Taxation of the coal in this case deprived the owner of its property without due process of law, as is held in the above case, and the owner is entitled to the protection of the 14th Amendment, which prevents the taking of its property in that way."

It was in *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S., 194; 50 L. Ed. 150, that this Court for the first time contrasted, at length and in detail, tangible with intangible personalty in respect of situs, and furnished the basis of the statement, prefaced to our treatment in this brief of cases involving tangible personalty, that the distinction is not fundamental but is rather a matter of the evidence concerning situs arising from the respective qualities of the two classes of property. The question was whether Kentucky could, consistently with the Fourteenth Amendment, tax refrigerator cars belonging to a Kentucky corporation, but permanently located in other States. The question was answered in the negative. So clearly did Mr. Justice Brown discuss the philosophical foundations of the power of taxation and the exercise of that power that we shall quote from the opinion at some length.

Of the basis for the exercise of the taxing power he pointed out that it was a corollary of protection afforded or benefits received. He said:

"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares,—such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature, and a taking of property without due process of law."

And in discussing the subject of territorial jurisdiction he used the following language:

"It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of State laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases

> of land, which, to be taxable, must be within the limits of the State. Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State; much less where such action has been defended by any court. It is said by this Court in the *State Tax on Foreign-held Bonds Case*, 15 Wall. 300-319, 21 L. Ed. 179-187, that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a State is not a subject upon which her taxing power can be legitimately exercised."

After pointing out that "the argument against the taxability of land within the jurisdiction of another State applies with equal cogency to tangible personal property beyond the jurisdiction," the opinion contrasts the respective situations of tangible and intangible personalty in the following terms:

> "There is an obvious distinction between tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the State of its situs except, perhaps, in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a State other than that of his domicil, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicil of the owner as the real situs of the debt, and also, more particularly in

the case of mortgages, in the State where the property is retained. Such have been the repeated rulings of this Court."

With reference to the foregoing, we call attention the fact that *as to each of the points of contrast s indicated by the court to exist as a general rule ween tangible and intangible property, the situation he property involved in the case at bar is analogous that of tangible property, rather than intangible.* us:

. The property is not "held secretly," the fund ing been created by a will whose probate is a mat- of record.

. Its existence and ownership, for the same reason, be ascertained in the State of its actual situs; and record shows that it has been so ascertained there is taxed there.

. The owner of the legal title—*i. e.*, the trustee— be reached by process in Maryland.

he court proceeded:

"The arguments in favor of the taxation of intangible property at the domicil of the owner have no application to tangible property. The fact that such property is visible, easily found, and difficult to conceal, and the tax readily collectible, is so cogent an argument for its taxation at its situs, that of late there is a general consensus of opinion that it is taxable in the State where it is permanently located and employed, and where it receives its entire protec-

> tion, irrespective of the domicil of the owner. We have, ourselves, held in a number of cases that such property, permanently located in a State other than that of its owner, is taxable there."

All these arguments are equally cogent in favor of taxing at its actual situs the property involved here.

Following these intimations, the court qualified its decision as follows:

> "It is unnecessary to say that this case does not involve the question of the taxation of intangible personal property, or of inheritance or succession taxes, or of questions arising between different municipalities or taxing districts within the same State, which are controlled by different considerations."

It seems clear that this cautionary expression should be read and interpreted in the light of what was evidently in the mind of the court—the normal case of intangibles held by a person in his own right—and should not be given application to such a case as the present.

We thus come to *Frick v. Pennsylvania*, 268 U. S., 473; 69 L. Ed., 1058, the latest and in some respects the most notable of the expressions of this Court on the situs of tangible property. In so far as it dealt with that subject, the question was as to the validity of the application of the Pennsylvania tax on the transfer of property after death to tangible personal property in other States. The tax, as so sought to be applied, was held invalid.

The court summarized the effect of previous decisions in the following passage:

> "These decisions show, first, that the exaction by a State of a tax which it is without power to impose is a taking of property without due process of law, in violation of the 14th Amendment; secondly, that while a State may so shape its tax laws as to reach every object which is under its jurisdiction, it cannot give them any extraterritorial operation; and, thirdly, that, as respects tangible personal property having an actual situs in a particular State, the power to subject it to State taxation rests exclusively in that State, regardless of the domicil of the owner."

It further quoted extensively from *Union Refrigerator Transit Co. v. Kentucky, supra,* of which we have made such copious use above, and also quoted the matter excerpted above from *Pullman's, etc. Co. v. Pennsylvania,* stating the historical basis of the maxim *mobilia sequuntur personam,* and overruled the contention of counsel for the State that a fundamental distinction existed, as to territorial jurisdiction, between property taxation and inheritance taxation.

From this review of the cases under this head it appears that the doctrine is now fully entrenched that tangible personal property outside the State of the owner's domicile is not subject to taxation by that State, while as to intangible property in the form of securities it seems equally clear that it is taxable in the State of its actual situs and also, even when separated from the State of the owner's domicile, taxable by that

State *when voluntarily kept in the foreign State by the owner.* The contention here made is that when its situs in the foreign State is fixed by law or by the terms of the instrument under which it is held, there is far more reason for applying the rule, now thoroughly settled, which governs tangible property, than there is in the case of tangible property itself, which only the owner's will, rather than legal compulsion, maintains in the foreign jurisdiction.

Viewing the question from the point of view of the various reasons usually relied upon by this Court to sustain taxation, as laid down in the decisions, we would inquire whether any of those reasons is operative here. Not surely that of the protection of the tax subject, for the trust estate receives no protection from Virginia. Not that of preventing the escape of property from taxation, for it stands admitted that the property is both taxable and taxed in Maryland. Not the reason of convenience upon which the maxim *mobilia sequuntur personam* is based—the difficulty of discovering, localizing, and exacting a contribution from intangible personalty—for the existence, the location, and the liability of this fund are all determined by law and proclaimed by public record with far more of certainty, fixity, and permanence than in the case of tangible personalty. Not the conception of a proportionate contribution in return for the benefit of living in the State, for that contribution is made through the income tax; and if the suggestion were that this contribution should be measured by apparent wealth there would be just as much reason for including real

estate outside of Virginia. No reason remains except the naked application of the maxim *mobilia sequuntur personam;* but of this we may say in the language of *Union Refrigerator Transit Co. v. Kentucky, supra,* already so heavily drawn upon:

> "* * * the maxim *mobilia sequuntur personam* may only be resorted to when convenience and justice so require. The proper use of legal fiction is to prevent injustice, according to the maxim *In fictione juris semper aequitas existit.* See *Eidman v. Martinez,* 184 U. S. 581, 46 L. Ed. 700, 22 Sup. Ct. Rep. 515; *Blackstone v. Miller,* 188 U. S. 189, 206, 47 L. Ed. 439, 445, 23 Sup. Ct. Rep. 277. 'No fiction,' says Blackstone, 'shall extend to work an injury; its proper operation being to prevent a mischief or remedy an inconvenience, that might result from the general rule of law.' (3 Bl. Com. 43.) The opinion argues with great force against the injustice of taxing extraterritorial property when it is also taxable in the State where it is located."

Cases in Other Courts.

In our view, the conclusion which we have sought to establish results with such controlling persuasiveness from the decisions of this Court that the citation of other authorities is unnecessary. A number of cases will be found collected in the note to *Commonwealth v. West India Oil Refining Co.,* 138 Ky., 828; 129 S. W., 301; 36 L. R. A., N. S., 295, at the reference last given. It may be remarked that while the case last cited is an exception, cases in the State courts frequently are de-

cided on questions of statutory construction rather than on constitutional principles.

This has measurably been the case in Virginia, the prior cases in that State but faintly suggesting a serious presentation of the constitutional question which we have urged. A rapid review will show the growth of the doctrine that led to the summary disposition of the case at bar.

In *Selden v. Brooke* (1906), 104 Va., 832, the question was as to the validity of taxes assessed by the city of Norfolk upon a trust fund consisting of intangible property in the hands of a non-resident trustee, in the income from which a resident beneficiary had a life estate. The trustee was there appointed by decree of the Corporation Court of the City of Norfolk, which had jurisdiction over the fund. It was held that the fund was taxable in Virginia. It is quite apparent that the fact that the fund was created in Virginia was not without its effect on the minds of the court, for in deciding the case the court pointed out that if the domicile of a non-resident trustee were to fix the situs of intangible property for taxation, there would be afforded a "ready means of escape from taxation." A quite different situation exists in the present case, where the fund prior to the creation of the trust was never in Virginia, where there is no control of it by any court in Virginia, and where consequently no question of "escaping" from taxation arises, but the question is whether the existence of a Virginia beneficiary is to have the effect of making that taxable by the State, which was not taxable before.

The point under the Federal Constitution, which we urge here, does not seem to have been presented in the case under consideration. The court said:

> "The contention that the construction indicated would render the statute unconstitutional, proceeds upon the hypothesis that the tax is against the non-resident trustee, whereas he is personally unaffected by the imposition, and is but the conduit through the medium of which the tax upon the property of a citizen passes into the State treasury."

We are not proceeding here on the hypothesis that the tax is unconstitutional because it is against a non-resident trustee, but, as has been fully shown, upon the hypothesis that it is unconstitutional *because the thing taxed is not within the jurisdiction of the State.*

So, also, in *Wise v. Commonwealth* (1918), 122 Va., 693, the fund from which the trust was created originated in Virginia and was made the subject of a trust in favor of a non-resident trustee, but having some Virginia beneficiaries. This circumstance, again, seems to have affected the court in holding the trust fund subject to taxation in Virginia. The court said:

> "If it were otherwise, citizens of this State could, by creating foreign trusts, deprive the State of a very large part of its revenue."

In *Franklin Trust Co. v. Booker* (1918), 122 Va., 680, however, a case was presented where the fund itself had never been within the State. The constitutional point upon which we rely does not, from the report of the case, appear to have been distinctly presented; and

the court held the fund taxable upon the authority of a simple reference to the *Wise* case just discussed.

Likewise, in *Ellett v. Commonwealth* (1922), 132 Va., 136, on a state of facts apparently identical with that in the *Booker* case, this Court in a *per curiam* opinion held the fund taxable, contenting itself with a mere citation of the cases discussed above.

As intimated at the outset of this discussion, the present case exhibits certain characteristics of fact which do not appear to have existed in the cases reviewed. For example, it does not appear from them that the trust had been subjected to taxation by the State in which it was held. In some of the cases the fund originated in Virginia. In none of them does the constitutional point appear to have been made which we presented to the court, and the situation appears to be that the court passed into its present course of decision without a realization of the far-reaching contrast of fact between the earlier decisions and the later

Conclusion.

The tax complained of represents a manifest effort by the State to reach a tax subject beyond its jurisdiction, in contravention of the Fourteenth Amendment, and the decision of the Supreme Court of Appeals of Virginia should be reversed.

Respectfully submitted,

NATHL. T. GREEN,
ROBT. B. TUNSTALL,
Counsel for Petitioner.

(5577)

the court held the fund taxable upon the authority of a simple reference to the *Wise* case just discussed.

Likewise, in *Ellett v. Commonwealth* (1922), 132 Va., 136, on a state of facts apparently identical with that in the *Booker* case, this Court in a *per curiam* opinion held the fund taxable, contenting itself with a mere citation of the cases discussed above.

As intimated at the outset of this discussion, the present case exhibits certain characteristics of fact which do not appear to have existed in the cases reviewed. For example, it does not appear from them that the trust had been subjected to taxation by the State in which it was held. In some of the cases the fund originated in Virginia. In none of them does the constitutional point appear to have been made which we presented to the court, and the situation appears to be that the court passed into its present course of decision without a realization of the far-reaching contrast of fact between the earlier decisions and the later

Conclusion.

The tax complained of represents a manifest effort by the State to reach a tax subject beyond its jurisdiction, in contravention of the Fourteenth Amendment, and the decision of the Supreme Court of Appeals of Virginia should be reversed.

Respectfully submitted,

NATHL. T. GREEN,
ROBT. B. TUNSTALL,
Counsel for Petitioner.

(5577)